

**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**APPEAL OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE  
D/B/A EVERSOURCE ENERGY**

Docket No. 2018-0305

**OBJECTION TO PUBLIC UTILITIES COMMISSION'S  
MOTION FOR SUMMARY AFFIRMANCE**

NOW COMES Public Service Company of New Hampshire d/b/a Eversource Energy (“Eversource” or the “Company”) by and through its counsel and, pursuant to Supreme Court Rule 25, hereby objects to the New Hampshire Public Utilities Commission’s (the “Commission”) Motion for Summary Affirmance in this proceeding. Procedurally, the Commission’s motion cannot be entertained under Rule 25. Substantively, it evades relevant issues, attempts to revise history, and is legally flawed.

The primary issue in this case is whether the State must provide for repayment of money it “borrowed” from a utility to pay for services contracted by, and provided exclusively for, the State. The decision appealed from, by relying upon accounting legerdemain, would prevent such repayment. The primary argument underlying the Commission’s motion is that Eversource “effectively” recovered these borrowings via Eversource’s existing rates – rates established before the borrowings were undertaken or even contemplated – with no knowledge or expectation that such amounts would be taken via assessment from Eversource. The Commission’s arbitrary determination to deny recovery is contrary to law and should not be summarily affirmed by this Court; the Court should accept this appeal.

In support of this submission, Eversource says the following:

1. As a first matter, the Commission's motion cannot be entertained under Rule 25.

Per that Rule:

An order of summary affirmance under this rule may be entered *when (a) no substantial question of law is presented* and the supreme court does not disagree with the result below, or (b) the case includes the opinion of the trial court, which identifies and discusses the issues presented and with which the supreme court does not disagree, *or (c) the case includes the decision of the administrative agency appealed from, and no substantial question of law is presented* and the supreme court does not find the decision unjust or unreasonable, or (d) other just cause exists for summary affirmance, in which case the order shall contain a succinct statement of the reason for affirmance.

Sup. Ct. R. 25 (emphasis added). In the instant case, a substantial question of law has been presented relative to the Commission's interpretation and application of controlling statutory and constitutional law. The Commission's decision was not compliant with the requirements of RSA 363:28, III that provides: "The public utilities commission shall charge a special assessment for any such amounts against any utility participating in such proceedings *and shall provide for the timely recovery of such amounts for the affected utility.*" (Emphasis added). The Commission's decision was also not compliant with the requirements of RSA 365:38-a that provides: "If an award of costs is granted in a proceeding other than one involving a change in a utility's rates, *the entire amount of the award shall be immediately recovered by the utility through measures approved on a timely basis by the commission.*" (Emphases added). Further, this case presents the question whether the State (through the Commission) can constitutionally "borrow" money from a private party to pay for contracts entered into by the State to fulfill a public purpose and then prevent that private party from actually being compensated for that borrowing.

2. Since substantial questions of both statutory and constitutional law have been presented in this matter, summary disposition under Rule 25 is not procedurally available and the Commission's motion must be denied.

3. Similarly the State's suggestion that the Court decline this appeal under Rule 10 would leave these substantial questions of statutory and constitutional law unanswered and provide no remedy for Eversource to receive just compensation for the money taken by the State to pay its bills.

4. With respect to substance, the Commission argues that there is no question of law presented in Eversource's petition and that the Commission's decision is neither unjust nor unlawful. The Commission is not correct. The Commission first contends that:

In Order No. 26,108 the Commission properly found that Eversource could not defer costs in FY17 when it had already expensed those same costs in FY16. App. at 4. Otherwise, when the deferred costs were expensed **upon rate recovery**, the company would be expensing the same 2016 consultant costs for a second time. Thus, having chosen to expense the 2016 consultant costs, rather than defer those costs, established utility accounting standards preclude Eversource from later including those previously expensed costs as deferred costs **to be expensed again in a future year**.

Commission Motion at 5-6 (emphases added). This is the accounting legerdemain referred to earlier. RSA 363:28 and 365:38-a call for "timely recovery" or other "measures" that would result in a utility recovering monies borrowed by the State to pay for State consulting contracts. These statutes presuppose that repayment of such borrowing would not be accomplished by existing rates. Contrary to these statutes, the Commission argues that Eversource's existing rates provided the required compensation. In essence, the Commission's decision means that it could make no provision for recovery of these costs by a utility by claiming that such recovery is "effectively" part of pre-existing rates. Such

a result would undermine the intent and purpose of these two statutes resulting in unconstitutional takings of Eversource's property.

5. Moreover, the Commission's reference to "upon rate recovery" is instructive. Only once allowed by the Commission in rates would this money be recovered. These were special, incremental, expenses incurred by the State of New Hampshire and charged to Eversource for which Eversource sought recovery for the first and only time by the filing of its underlying petition. There was no "second time" or "future year" in issue. The only time "rate recovery" would ever occur was when Eversource's petition was granted.

6. The Commission's motion further demonstrates its awareness that Eversource will not be compensated for the State's "borrowings" as a result of its decision. In its Motion, at 7, the Commission claims that Eversource "*effectively* recovered them through Eversource's regular rates." (Emphasis added.) The law requires that Eversource be actually compensated. The Commission's use of the adverb "effectively" demonstrates that no recovery actually occurred – certainly there was no provision for actual recovery as required by RSA 363:28 and 365:38-a. There is no such thing as "effective" recovery of costs. Either costs are recovered, or they are not. The consultant costs in issue were not routine operating and maintenance costs of Eversource which it might be expected to manage between its rate case filings. The consulting costs here were unique, incremental costs incurred by the State of New Hampshire to pay for services obtained pursuant to special authority granted in law and specially assessed against the utility. Eversource had no ability to manage or limit these costs, but was required by force of law to pay them and, by law, is permitted to recover them. Nothing about these costs was like "other operating and maintenance costs" and there is no reason to treat them as such. The Commission

levied a special assessment on Eversource and Eversource was entitled to a special adjustment to actually recover the amounts borrowed.

7. Directly following the argument that Eversource “effectively chose” to recover these costs through rates that had been set before the costs were incurred, the Commission contends:

Here, the Commission effectively treated the expensed 2016 consultant costs as having been recovered through Eversource’s approved rates and, therefore, disallowed a second recovery through a special rate adjustment applicable to appropriately deferred costs.

Commission Motion at 7. Thus, first the Commission argued that “effective” recovery was obtained by Eversource “effectively” choosing something, but later argues that such recovery occurred by the Commission “effectively” doing something on its own. This is both inconsistent and incorrect. As noted above, there was no “effective” recovery of these costs. They were never included in, or recovered through, Eversource’s existing rates. There was no “first recovery” that might create a “second recovery.” The Commission did not find that Eversource would be able to recover the costs in some manner other than that sought by Eversource – instead, the Commission did not permit Eversource to recover costs based upon its apparent conclusion (raised for the first time in this very Motion for Summary Affirmance) that it, and not Eversource, could treat the costs as “effectively” recovered previously. The Commission’s shifting and conflicting arguments ignore how utility rates are set, and ignore the special treatment that costs created for consulting expenses of the State are afforded under New Hampshire law. The Commission’s decision was unjust and unlawful and must be reviewed by this Court.

8. In its final contention, the Commission attempts to distance itself from the requirements of RSA 365:38-a and RSA 363:28, III and to sweep away a genuine legal

issue so as to avoid this Court's review. The Commission should not be allowed to so easily avoid review by the only body with authority to determine whether the Commission's actions complied with two express statutory provisions in New Hampshire law as well as over-arching Constitutional requirements. To accept the Commission's argument is to conclude, contrary to long-standing New Hampshire law, that neither statute has any meaning or purpose on the occasions where the Commission determines, in the exercise of its sole discretion, that "effective" recovery was somehow obtained. *See, e.g., Weare Land Use Assn. v. Town of Weare*, 153 N.H. 510, 511-12 (2006) ("The legislature will not be presumed to pass an act leading to an absurd result and nullifying, to an appreciable extent, the purpose of the statute.") and *Appeal of Barry*, 142 N.H. 284, 287 (1997) (the Court will not interpret a statute so as to render it meaningless). The Commission does not, and cannot, point to any proceeding or any evidence in any filing or docket where these costs were included as part of any calculation of Eversource's rates. The Commission's determination does not comport with the law of New Hampshire and this case presents a relevant, material dispute about the meaning and application of the law that is rightly before this Court to resolve.

9. Eversource also notes for the Court that while the Commission attempts to undermine Eversource's claim for reimbursement by arguing that Eversource violated relevant accounting rules, that argument is neither correct nor relevant to the issue before this Court. As to the accuracy of the argument, the Commission posits that Eversource did not follow certain accounting rules and must, therefore, not be permitted to recover these costs. Eversource complied with all relevant accounting rules. As pointed out in Eversource's motion for reconsideration, App. at 8, the relevant accounting rules allow a

measure of judgment on the accounting treatment of these items. The relevant rules relate to the inclusion or exclusion of items based upon a determination of the probability of recovery – a judgment call. When, in Eversource’s judgment, the probability changed by the submission of Eversource’s underlying filing, the accounting followed the change in probability and appropriately resulted in a deferral. That is, the cost was expensed until Eversource determined that the cost was probable of recovery and when that determination was made, the expense was reversed, and a regulatory asset was created. This resulted in no net expense and no recovery either. When the cost is recovered, it will be expensed to match the revenue intended to recover it and this complete set of accounting entries results in a single expense matched by the amount collected. Nothing about Eversource’s judgments violated the accounting rules and there is no basis for the Commission to rely upon that as a reason to deny Eversource its legal right to recover these costs.

10. As to relevance, the Commission may disagree with certain accounting entries; those entries can be changed. Regardless of any such disagreement, however, the statutory and constitutional issues involved here demand that the State pay for what it has taken. A disagreement over accounting entries does not provide the Commission with an ability to take private property without compensation. The Commission’s decision is essentially (or “effectively”) a penalty imposed upon Eversource merely because the Commission would prefer that accounting entries were made differently. Nowhere has the Legislature provided the Commission with authority to impose such civil penalties against a utility for this reason.

11. Finally, it is telling that the Commission’s motion elects to ignore entirely one of the significant issues raised in Eversource’s notice of appeal. At no point in the

Commission's motion does it acknowledge or address Eversource's equal protection argument under State and Federal law. As described in Eversource's notice of appeal and underlying filings, the Commission has permitted another utility in New Hampshire to recover the same expenses sought by Eversource, apparently without knowing anything about how those expenses were treated by that company. Then, on an entirely arbitrary basis, the Commission determined to review, and then disallow, those same expenses when sought by Eversource. It appears that the Commission believes it may make any decision it wishes with respect to recovery by utilities and then evade any review of those arbitrary decisions by simply ignoring them. This Court should deny the Commission's motion and should accept this appeal.

**WHEREFORE**, Eversource requests that this honorable Court:

1. Deny the Commission's Motion for Summary Affirmance;
2. Accept this appeal; and
3. Grant such further relief as may be just and equitable.

Respectfully submitted,  
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE  
D/B/A EVERSOURCE ENERGY

By its Attorneys,

Dated: June 29, 2018

By:



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**CERTIFICATE OF SERVICE**

I hereby certify that on June 29, 2018, a copy of the above was served to the following:

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